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February 7, 1997

Mr. Darryl Cooper
Cable Services Bureau
Federal Communications Commission
2033 M Street
Washington, DC 20554

Re: IB Docket 95-59
CS Docket 96-83

Dear Mr. Cooper:

Thank you for meeting with us to discuss issues associated with over-the-air reception devices.

During our meeting, you requested that we provide you with case law to support our contention that the Commission has legal authority to preempt non-governmental restrictions on DBS dish receivers.

We believe that strong case law exists empowering the Commission to act aggressively in ensuring that all Americans, regardless or property ownership or economic class, have access to DBS. Courts have long recognized Congress' power to alter existing contractual obligations pursuant to its constitutional authority over interstate commerce. Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602, 639-640 (1993). Similarly, it is settled law that, if Congress has the power to enact a statute, the application of that statute via regulation cannot be defeated by the mere existence of a private contract. Connolly v. Pension Benefit Guarantee Corp., 475 US. 211 (1986) According to the Connolly court, "[t]he fact that legislation disregards or destroys existing property rights does not always transform the regulation into an illegal taking." Id. at 224.

To determine whether a taking has occurred, courts will conduct a factual inquiry which "necessarily entails complex factual assessments of the purposes and affects of governmental actions". Yee v. City of Escondido, 503 US 519, 522 (1992) . Among the factors to be considered are the "character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations". Pruneyard Shopping Center v. Robins, 447 US 74, 83 (1980). A taking is less likely to be found if

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the regulation at issue is part of a " public program adjusting the burdens and benefits of economic life to promote the common good". Penn Central Transportation Co. v. New York City, 438 US 104,124 (1978).

Courts have declined to find a taking with respect to actions taken by the Commission pursuant to an act of Congress that have modified existing leasehold agreements. In FCC v. Florida Power Corp., 480 US 245, the Supreme Court held that the Commission, in implementing the Pole Attachments Act by setting the rates which utility companies could charge companies for space on their poles, did not affect a taking of the pole owner's property. Explaining its reasoning, the Court noted that that "statutes regulating economic relations of landlords and tenants are not *per se* takings." Id. at 252.

Landlord claims that preempting private restrictions on DBS access would constitute a taking are based primarily on the Supreme Court's holding in Loretto v. Teleprompter Manhattan CATV Corp. 458 US 419 (1982). In Loretto, the Supreme Court held that a state statue effectuated a taking because it required landlords to permit the installation of cable television equipment on their property.

However, the issues presented by the preemption of private restrictions on DBS are not comparable to the third-party invasion and permanent occupation of private property that is addressed in Loretto. Indeed, the Supreme Court specifically noted that Loretto does not apply to the issue of regulatory modifications of rights between landlords and tenants. Id. at 439-441 n.19. This distinction is in accord with Yee, in which the Court states that no taking occurs where laws "merely regulate [the owner's] use of land by regulating the relationship between landlord and tenant." Yee, 503 US at 519. In preempting restrictions on tenant access to DBS, the Commission would be modifying landlord-tenant agreements to grant an entitlement to the *tenant*, rather than to an incurring third party, as in Loretto . This is the exact sort of modification that the Court has suggested would be acceptable.

Landlord attempts to deny tenants access to satellite-delivered programming on constitutional grounds must also be assessed in the context of viewers' recognized First Amendment rights to have access to a multiplicity of sources of news or information. In Red Lion Broadcasting Co. Inc. v. the Federal Communications Commission, 395 US 367, 390 (1969), the Supreme Court emphasized the importance of viewer access to a wide variety of broadcast communications: "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged...by the FCC."

In recent cases concerning must-carry issues arising out of the 1992 Cable Act , the Court strongly reaffirmed the importance of assuring viewers access to a variety of news and information, stating that "[a}ssuring that the public has access to a multiplicity of information services is a governmental purpose of the highest order, for it promotes values central to the First Amendment." Turner Broadcasting Systems, Inc. Federal Communications Commission, 114 S. Ct. 2445, 2461 (1994)

Based on the above, it is clear that the preemption of private lease restrictions on DBS antennas would not constitute a regulatory taking. Preemption would promote the public good, and would in no way reduce the value of a landlord's investment in a unit or discourage a tenant from paying rent. Moreover, only preemption will ensure that tenants and unit owners will be able to enjoy their long-established First Amendment rights as viewers of electronic programming services.

In addition, you asked during our meeting that we elaborate on our proposal that the Commission set forth, in an accessible and easy-to-read fashion, a list of restrictions on DBS antenna placement that it finds unreasonable.

We suggest that such a statement be derived from the findings contained in the Commission's Report and Order/Memorandum Opinion and Order ("Order") issued in the above-captioned proceeding on August 6, 1996. Examples include the following:

- Any local restrictions on DBS antenna placement must be made available to viewers in writing. See Order at ¶ 25.

- Restrictions intended to preserve the historic status of a registered historic district may be appropriate. Any such restrictions must be no more burdensome than necessary, and must be applied to all other modern fixtures that are comparable in size, weight, and appearance. See Id. at ¶ 26.

- Safety-related restrictions may be appropriate, provided they serve clearly-defined, non-discriminatory safety objectives. Such restrictions must be no more burdensome than necessary and must be applied to other fixtures that are of comparable size and weight. See Id. at ¶ 25.

- Safety related permits can be required where the antenna mast exceeds 12 feet above the roofline, where the height of the antenna structure above the roofline exceeds the distance to the property line, or where the antenna would be near an electric power line or would encroach upon a public space. See Id. at ¶ 25

- Local rules that require viewers to obtain prior approval from community associations or local zoning boards for antenna installation are prohibited, as are rules that establish permitting and/or fee requirements, if the rules are unrelated to safety or historical concerns. See Id. at ¶ 17

- Local restrictions based solely on the size or weight of a DBS antenna are prohibited to the extent they affect antennas less than one meter in diameter. See Id. at ¶ 37

- Screening requirements on DBS antennas may not unreasonably burden the viewer, and are permissible only where such requirements are also imposed to screen other devices such as air conditioning units. See Id at ¶ 19.

- Where a permit is legitimately required, the application for a permit must be handled expeditiously. See Id. at 26. (CEMA would add that the permit application must be processed in a nondiscriminatory fashion and in no less than thirty days after submittal).

The Commission could update its rules as caselaw and further determinations may merit. We believe that such an authoritative statement of what is or is not permissible will minimize confusion among consumers and local regulators alike.

Please contact us if we can provide you with any further information.

Sincerely,

Gary Klein

Gary Klein
Vice President
Government and Legal Affairs

CC: Meredith Jones, William Johnson, Joann Lucanik, Rick Chessen